FILED
NOV 18 1968

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 692

DEMING NATIONAL BANK, a National Banking Corporation,
Petitioner,

vs.

MORRISON FLYING SERVICE, a Montana Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The references to the opinions of the United States district court and of the court of appeals have been correctly stated by the petitioner, and they are accurately reproduced in Exhibits "A," "B" and "C" attached to the petition.

JURISDICTION

Respondent agrees with petitioner that this Court has *jurisdiction* to review the judgment by writ of certiorari, but not for the reasons advanced in the petition. The latter appear to be arguments as to why petitioner feels that the Court should exercise its jurisdiction, and we agree with none of them, for the reasons hereafter set forth.

We submit that the Court has jurisdiction of this proceeding by virtue of 28 U.S.C., Sec. 1254(1), but that no justification exists for its exercise in this instance.

QUESTIONS PRESENTED

We submit that the following questions are more appropriate for this Court's consideration than those presented in the petition.

1. Is petitioner entitled to review of a decision which works to its advantage, and which, if reversed, would increase its personal liability under the judgment?

2. Is any real, existing conflict among the circuits shown by the application of a uniform construction of a statute, upon different factual situations, to achieve a different result?

3. Is there a conflict of sufficient importance where, if it exists at all, it arises under a decision over twenty-five years old?

STATEMENT OF THE CASE

Respondent, Morrison Flying Service, entered into a subcontract with Cisco Aircraft, Inc., under which the former agreed to provide search planes and pilots at specified rates to assist the latter in performance of its prime

contract for spraying forests for the United States government. The contract provided that Morrison would be paid within forty-eight hours after the contract proceeds were received from the government by Cisco.

The financing of Cisco's operations was undertaken by the petitioner, Deming National Bank, with knowledge that two of the bank's stockholders and directors were personally involved in these operations. These individuals were personally obligated on Cisco's performance bond given to the United States, and they had procured, for a fee, the corporate surety on this bond. They were also sureties on Cisco's note to the bank. With this knowledge, the bank took an assignment from Cisco of the proceeds to which it would become entitled after performance of the contract. Upon learning of this development, and after Cisco advised that the bank would pay her bill, Mrs. Herrin, president of Morrison, requested the bank to assure payment for her services under the contract. The bank replied, advising that it was Cisco's paying agent, and that it would pay all bills after the contract proceeds were received. The correspondence is set forth in petitioner's statement of the case.

Respondent performed its part of the contract only after receiving these assurances from the bank, and would not have done so otherwise. Other means of assuring payment were available to respondent, but these were deemed unnecessary because of the bank's letter.

A few days after completion of the contract, Mr. Monroe, president of Cisco; Mrs. Herrin, president of Morrison; and a government representative met in Helena, Montana, and agreed as to the number of hours flown and as to the amount Morrison would receive from the proceeds of the contract. An itemized statement containing

this information, including the amount due, was addressed to the bank, signed by Mrs. Herrin on behalf of Morrison, and by Mr. Monroe on behalf of Cisco, and mailed to the bank. Several weeks later another document was received by the bank, purporting to be an assignment from Cisco to National City Aircraft Leasing Co. of the proceeds due from the government. This document also purportedly authorized the bank to reimburse itself and to pay the bond premium to the company owned by the bank directors referred to above.

Later, on October 1, 1962, Morrison's attorney inquired of the bank as to when Morrison could expect payment of its portion of the contract proceeds. The bank replied on October 9, 1962, advising that the bank had no control over the funds. On October 15, Morrison's attorneys replied, reminding the bank that the statements in its last letter were contrary to those contained in its letter of June 11, when it advised that the bank was paying agent for Cisco and that all bills would be paid when they received the government payment. The October 15 letter also further advised the bank that if it did not pay Mrs. Herrin's bill, suit would be brought against it for that amount.

Although thus informed of the adverse claims upon the contract proceeds, the bank took no action to interplead the claimants or to deposit the funds in court after they were received. These funds were received by the bank on December 24, 1962, and immediately thereafter disbursed, by payment to the bank of principal, interest and "service charges" on the loan; $3,168.75 to the company owned by the bank directors, in payment of the bond premium; and $8,536.74 to National City Aircraft Leasing Co. The balance in the sum of $11,999.25 was retained by the bank and invested as a part of its capital. There is no question about the fact that the bank has no interest in this fund.

Plaintiff's amended complaint asserted in count one a claim for judgment against the bank in the full amount of its bill. The second count of the complaint asserted plaintiff's interest in the undisbursed fund held by the bank; it was asserted that defendants National City Aircraft Leasing Co. and Cisco Aircraft, Inc., had no rights in the fund as against those of the plaintiff, and subsequent pleadings also raised the issue as to the priority of plaintiff's rights as against those of the United States government on tax liens assessed against Cisco. The decision of the court of appeals, as reflected in the judgment entered upon the mandate, found the bank personally liable to the plaintiff for the full amount of plaintiff's bill; also found that plaintiff had an equitable lien upon the undisbursed fund, which was superior in right to that of the United States, and that the bank could apply this fund to the satisfaction of the judgment.

ARGUMENT

Attention should first be directed to certain statements made on page 12 of the petition. Petitioner asserts that no proper service of process was ever accomplished against the defendants Cisco Aircraft, Inc., and National City Aircraft Leasing Co. These statements are incorrect. It is true that the record transmitted to the court of appeals by the district court clerk did not contain the affidavit for publication of summons against Cisco Aircraft, Inc., and the return of service of the summons upon National City Aircraft Leasing Co. The clerk does not ordinarily do so unless a question of proper service is raised. These documents have since been certified by the clerk of the district court and transmitted to this Court. They demonstrate that there was proper service against each of these defendants and that proof of such service was filed before the default judgments were entered.

1. Petitioner Has No Standing to Complain of the Court of Appeals' Interpretation of Section 1655.

Petitioner's only real argument for review by this Court is that a conflict exists among the circuits with respect to Section 1655. Curiously, the resolution of that supposed conflict in the manner suggested by petitioner would result in increasing its personal liability to respondent by the sum of $11,999.25.

The judgment entered upon the mandate of the court of appeals, which was approved as to form by petitioner and which clearly reflects the terms of the mandate, awards judgment in favor of respondent and against petitioner personally in the sum of $14,424.81. The judgment further provides, however, that petitioner can apply toward the partial satisfaction of this judgment, the undisbursed $11,000 fund. This latter provision of the judgment arose as the result of the court of appeals' determination that Section 1655 was properly applied, and that the government lien upon the fund was inferior to the lien of the respondent. If petitioner were to succeed on its main point in this proceeding, the judgment would remain intact but it would have to be paid entirely out of the bank's own funds. This alone should defeat the petition. *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 71 Sup. Ct. 534, 95 L.Ed. 702.

2. There Is No Real, Existing Conflict in the Circuits on the Point Decided by the Court of Appeals.

Petitioner contends that the decision below has construed 28 U.S.C., Sec. 1655, to permit a general creditor to utilize its provisions in an in personam action, without asserting a pre-existing lien or claim to property. Counsel then contend that this is the rule in the seventh and tenth circuits, and that a contrary rule prevails in the second,

fourth, fifth and sixth circuits. Cases from all of these circuits are cited by petitioner, supposedly supporting these contentions.

Petitioner has misinterpreted the opinion below. The court of appeals held, with respect to count two of the amended complaint, that the plaintiff had pleaded and established by sufficient evidence that it was the owner of an equitable lien upon the undisbursed fund held by the bank, and that this was an antecedent lien within the purview of Section 1655. We quote portions of the opinion reproduced at pages A20 to A22 of the petition:

> "The district court based its determination of lack of coverage under 1655 on the finding that no antecedent lien existed. Appellant argues that this represents too narrow a construction of section 1655 in that it covers not only 'liens' but 'claims made against property.' While this is certainly true it is doubtful that the district court's statement should be interpreted so narrowly. The term 'antecedent lien' was undoubtedly used by the district court to include equitable liens and claims as well as contractual or statutory liens.
>
> * * *
>
> "In appellant's Amended Complaint it is alleged that appellee Deming National Bank has in its possession approximately $11,000.00 of the fund received from Cisco. Appellant further alleges that it has a prior claim to such funds because of appellee's promise to make payment therefrom. Included with the complaint are the documents, the assignment to Deming National Bank and the June 11th letter to Mrs. Herrin, containing the promise to pay from the funds to be collected from Cisco. We hold that this sufficiently alleges and establishes an equitable lien upon the fund held by Deming to satisfy the requirements set forth in Shuford v. Anderson, supra, for an antecedent lien."

Petitioner similarly misconstrues the other tenth circuit decisions. By way of illustration we quote from *Shu-*

ford v. *Anderson*, 10 Cir. 1965, 352 F.2d 755, 760, cert. den., 383 U.S. 935:

> "The complaint in this case, apart from any other theory presented by it, expressly alleges an agreement between Shuford and Anderson that each was to have a share in the property specifically described in the complaint. All of the other allegations in a sense orbit around this alleged agreement. Such an agreement, if sustained by the proof, would clearly create an interest in the land, subject to protection by a local action. The extent and the nature of the interest would depend upon other allegations or upon legal implications from the relationship of the parties, but the claim would be created by a pre-existing agreement and not merely by the adjudication of the court."

The seventh circuit decisions cited by petitioner both held that Section 1655 may be utilized in an action to set aside a fraudulent conveyance without first reducing the claim to judgment. While these cases were discussed in the court of appeals' opinion, they were neither approved nor disapproved by that court. Thus they afford no basis for review in this proceeding.

We submit that the supposedly contrary cases cited by petitioner are not in conflict with the court of appeals' decision in this case. To some extent the older cases contain statements indicating that a different result might have obtained if these particular facts had been presented to the courts at the time those decisions were rendered. This is far from certain, however, and the most recent of those cases was decided in 1942. *Dan Cohen Realty Co.* v. *National Savings & Trust Co.*, 6 Cir. 1942, 125 F.2d 288. We submit that a mere possibility of conflict between cases decided over twenty-five years apart can hardly be termed a real, existing conflict between the circuits.

3. The Decision Below Is Clearly Correct.

The court of appeals held that the bank's letter dated June 11, 1962, constituted a promise to pay plaintiff's bill. The promise was found to be supported by consideration, in that performance on the part of the plaintiff was both detrimental to it and beneficial to the bank. It was noted that Mrs. Herrin refrained from taking alternative action to protect herself, because of the bank's promise, and that she would otherwise have done so, with probable success. To the argument that plaintiff was already bound to perform under the contract with Cisco, the court of appeals cited the *Restatement of Contracts*, Section 84, and Corbin, *Contracts*, Section 176. We quote a portion of the opinion reproduced at page A17 of the petition:

> "We recognize that there is a conflict among the authorities as to whether there is a sufficient consideration for a promise by a third person made to induce a party to an existing contract to perform. Professor Corbin recognizes this conflict and his comment about it has the approval of this court. We believe not only that the trend of recent decisions but the 'weight of authority' now compels us to follow the rule enunciated by the American Law Institute in Restatement, Contracts, § 84, 'Consideration is not insufficient because of the fact * * * (d) that the party giving the consideration is then bound by a contractual or quasi-contractual duty to a third person to perform the act in furtherance given or promised as consideration.'"

The conclusions reached by the court of appeals on the merits of this case are fully supported by the equities. Plaintiff's right to recovery is also justified on grounds of constructive trust and promissory estoppel. One cannot help but conclude, from the evidence, that the bank's actions in persuading plaintiff to perform the contract and in refusing payment after performance, were motivated by a

desire to protect the interests of the bank stockholders and directors who were personally involved in Cisco's operations. Although its June 11 letter gave a contrary impression, the bank withheld information as to its lack of power over the funds until plaintiff had fully performed. It paid no attention to the signed statement by Cisco as to the amount of plaintiff's bill, but attached considerable importance to a subsequent assignment of the proceeds from Cisco to National City Aircraft Leasing Co. It disbursed the proceeds of the government contract to persons other than the plaintiff, including itself and the aforementioned stockholders of the bank, with full knowledge of plaintiff's claim upon the fund. It has vigorously contested plaintiff's right to the undisbursed portion of the fund, even though it admittedly has no interest therein.

In conclusion, it is submitted that this case is one which was decided on its own particular facts, that there is no substantial federal question which will control future decisions, and that, for these reasons also, certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, A. W. Scribner, do hereby certify as counsel for respondent herein, that on the ..... day of November, 1968, I served the foregoing brief of respondent in opposition upon the petitioner by mailing a copy thereof, first class postage prepaid, to Benjamin M. Sherman, counsel for petitioner, at his office address, 210 South Silver Avenue, Deming, New Mexico 88030.

Dated this ..... day of November, 1968.

.....

A. W. SCRIBNER